No. 18836

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM LUCIAN COBB, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR THE UNITED STATES APPELLANT

RAMSEY CLARK,
Assistant Attorney General.

CECIL F. POOLE,
United States Attorney,
San Francisco, California, 94101.

J. HAROLD WEISE,
CHARLES R. RENDA,
Assistant United States Attorneys,
San Francisco, California, 94101.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys, Department of Justice,
Washington, D. C., 20530.

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REPLY BRIEF FOR THE UNITED STATES APPELLANT

I

THE DISTRICT COURT HAS NO JURISDICTION TO DISMISS A DECLARATION OF TAKING

Appellees cite nine cases at the opening of their brief for the proposition that a district court has jurisdiction to vacate a declaration of taking where "the estimate of the value of the condemned property is made by the government in bad faith" (Br. 10-11). In only one of the nine cases cited did a district court

purport to vacate a declaration of taking because an estimate of just compensation had, in its opinion, been made in "bad faith." *United States* v. *44.00 Acres in Monroe County, New York*, 110 F. Supp. 168 (W.D. N.Y. 1953). This order was held to be null and void in *United States* v. *44.00 Acres in Monroe County, N.Y. (Odenbach)*, 234 F.2d 410 (C.A. 2, 1956), cert. den., 352 U.S. 916. In reversing, the Second Circuit said, "However, the district court had no power to set aside the first amended Declaration of Taking, and its order so doing is void." 234 F.2d at p. 415. It is only then that the court proceeds with the language quoted at page 13 of appellees' brief that "We may concede arguendo" that a declaration of taking may be set aside if not made in good faith.[1] Only one other of the nine cases cited involves the vacation of a declaration of taking for any reason. *United States* v. *45.33 Acres in Princess Anne County, Va.*, 266 F.2d 741 (C.A. 4, 1959). As has already been pointed out in our opening brief (p. 35), the vacation of the declaration of taking in that case was based on failure to properly prosecute the action, the issue of alleged judicial power to review claimed lack of "good faith" being again expressly left open.

The other seven cases presumably are cited because somewhere in the opinion, usually when referring to the broad discretion of administrative officers in selecting the property to be taken in condemnation

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[1] The very expression "concede arguendo" shows that, far from holding as appellees claim, the Second Circuit had doubt as to the existence of this alleged judicial power over the executive.

suits, "good faith" or "bad faith" are generally mentioned.[2] But no declaration of taking is vacated in any of them. None of these seven cases involves an issue as to the "good faith" or "bad faith" of the appropriate government officer in determining the estimated just compensation to be filed with a declaration of taking. Leaving aside the *Odenbach* case which was reversed by the Second Circuit, the only case of the nine cited which has any relevance to our specific problem is another district court opinion, *United States* v. *29.40 Acres of Land*, 131 F.Supp. 84, 88 (D. N.J. 1955), where it is said, "* * * this Court cannot weigh in this regard the evidence as to what amount the estimated just compensation should be, but only the question as to whether or not the amount deposited had, in fact, been 'estimated,' and not deposited as a mere nominal or arbitrary sum." The Government must, for the reasons set out in its opening brief, disagree with that court's conclusion that it is appropriate to have a preliminary hearing on estimated compensation, and rely instead on the

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[2] Appellees may want to add to their collection the recent case of *United States* v. *Agee*, 322 F.2d 139 (C.A. 6, 1963), where the court of appeals said, "We hold that the District Court was correct in reviewing the decision of the condemning authority to the extent of determining whether the decision [as to how much property to take] was made in bad faith * * *." 322 F.2d at p. 142. Here, again, however, the administrative determination of the property to be taken was upheld. And it will be noted that, after reviewing Supreme Court decisions holding administrative decisions unreviewable, the Sixth Circuit relied completely on dictum of one of its own earlier decisions for the proposition urged by appellees. Cf. footnote 5, p. 36, of our opening brief.

opposite conclusion reached in *In re United States*, 257 F.2d 844 (C.A. 5, 1958), cert. den., 358 U.S. 908. In any event, the *29.40 Acres* case supports our present appeal since it recognizes that the only question to be tried is whether an estimate was in fact made —regardless of the merits of that estimate—rather than the vague "good faith," or "bad faith" standard used by the district court in the present suit.

Appellees argue at page 14 of their brief that there is a split of authority between *In re United States, supra*, on the one hand and the Court of Claims decision in *Travis* v. *United States*, 287 F.2d 916 (1961), on the other. Appellees further contend that *Travis* is supported by this Circuit's decisions in *City of Oakland* v. *United States*, 124 F.2d 959 (1942), and *Simmonds* v. *United States*, 199 F.2d 305 (1952), in the theoretical split with *In re United States*. In fact, there is no split of authority. All four opinions are on different issues, and are entirely reconcilable. Only *In re United States* is directly in point on the issue of whether the district court has jurisdiction to decide whether the appropriate administrative official has estimated just compensation for a declaration of taking "in good faith." [3] The *Travis* case (on a collateral attack) holds that the declaration of taking in a condemnation suit is valid, and,

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[3] The purported distinction (Br. 13-14) of this case on the ground that there the deposit was not nominal does not tend to prove jurisdiction of the court to adjudicate an issue raised by an allegation that, whatever the amount, the deposit was made in bad faith. Jurisdiction cannot vary depending upon the amount of the deposit.

while noting the various grounds on which a declaration of taking might be attacked, no decision is made as to any of them. The *Travis* case does agree with the argument made by the Government in its opening brief that "under the facts in United States v. Carey, et al., 9 Cir., 1944, 143 F.2d 445, it was held that the dismissal of the condemnation petition would not result in a divesting of the title acquired by the United States as a result of a declaration of taking." 287 F.2d at p. 919. *Simmonds, supra,* holds that "Discretion as to the extent, amount or title of property to be taken by the United States has been conferred by legislation upon the Secretary of the Army; and in the absence of bad faith or abuse of that discretion his determination is final." 199 F.2d at p. 307. If a declaration of taking was involved in the case, it was not an issue on appeal. While a declaration of taking is part of the appeal in *City of Oakland, supra,* the attack is on the constitutionality of the procedure as a whole, and this Court upheld it. This Court did not have before it any issue of whether the district court has authority to hold a hearing on the "good faith" or "bad faith" of the administrative officer in estimating just compensation. We submit that *In re United States* is squarely in point here and should be followed.

II

THE ALLEGATION OF THE DEFENDANT IN A CONDEMNATION SUIT THAT THE ESTIMATE OF JUST COMPENSATION FOR A DECLARATION OF TAKING HAS BEEN MADE IN BAD FAITH DOES NOT PRESENT A JUSTICIABLE ISSUE

In answer to this point in our opening brief, appellees argue at some length on the facts of the case. The qualifications of Mr. Milvoy Suchy, and the details of how he arrived at his conclusion that appellees' mining claims[4] were not damaged by the taking of an easement over an existing roadway is examined. Mr. Suchy's report of January 23, 1961, is criticized because it does not say in the words which presumably appellees would have used that there was no damage to their mining claims.[5] (See appellees' brief,

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[4] We are not concerned at this stage of the proceeding as to the validity of appellees' mining claims. It may be assumed, *arguendo,* that their mining claims are good. However, we must point out that nothing said in this or the Government's Opening Brief is intended as an admission for purposes of this or any other litigation on the validity of these claims.

[5] There can be little doubt, after reading Mr. Suchy's report as a whole, that in his opinion the taking of the easement upon which there was an existing road would cause no further damage to the appellees' mining claims. The Suchy report is set out as an appendix to this brief for the convenience of the Court. Mr. Suchy approaches the matter primarily as a mining engineer who is knowledgeable of mining claims. He is not required to phrase his report in the terms which an expert witness might use when testifying in court on the issue of just compensation itself. To argue about his phrasing is simply to raise another irrelevant issue. Clearly,

p. 22). Mr. Suchy's testimony in the hearing below is criticized because he mentioned the trespass action against Bate Lumber Company in the state court. We have already pointed out in our opening brief (p. 22) that, fairly read, the record as a whole merely shows that Mr. Suchy took into account the condition the property was in on the date the condemnation suit was filed and did not blind himself to previous history. Appellees argue the weight to be given this evidence and the judicial standards on which it might be overturned. They argue (Br. 25) about what "bad faith" means, and conclude that it is a term of "variable significance" and "broad application" but attempt no definition as applied to this case. Hence, in appellees' view it can be said to mean whatever the district court wants it to mean on the individual facts of the case. Appellees argue that the legal officers at the Department of Agriculture failed in their duty to advise the Secretary. And they argue obscurely that Mr. Suchy's knowledge of a pending patent application in the Department of the Interior might have had some bearing on his "bad faith" or "good faith." [6] Finally, appellees (Br. 28) get into

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an administrative official, on the basis of this report by a qualified mining engineer, would be within the scope of his discretion in estimating the just compensation owing to be merely nominal.

[6] Appellees imply (Br. 27) that there was some unreasonable delay in the processing of their patent applications. There is nothing to show that such applications were not handled in the normal course and, in fact, one of them has been allowed.

issues about technological improvements in mining operations which may permit them to profitably remine the ground under the roadway at some unspecified future date as one basis for their claim of more than nominal compensation.

Appellees claim they may raise as a matter of right all these issues about the preliminary administrative estimate of just compensation which is ultimately binding on nobody. We have serious doubts about the relevancy of all these issues on the far more serious question of just compensation itself. Indeed, appellees' arguments point out most dramatically why the district court should not be allowed to delve into the myriad facets of a vaguely defined "good faith" or "bad faith" on a purely preliminary administrative estimate of the compensation. If the Government is wrong in its estimate, the landowners are made whole for the delayed payment of just compensation by the 6% interest which accrues on the deficiency. *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933); *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306 (1923). It is submitted that a hearing on the preliminary estimate of just compensation is not required by either the Constitution or the Declaration of Taking Act;[7] that no useful purpose is served by such a hearing; that it is harmful because it always raises a large number of tangential issues, results in a first adjudication of the issues normally determined at a jury trial on the merits, and only serves to delay both the Government's possession of the property and

[7] See Government's Opening Brief, pp. 12-16, for text.

the ultimate award of just compensation. Frustration of the purposes of the Declaration of Taking Act is clear.

CONCLUSION

The district court's memorandum and order of March 14, 1963, purporting to set aside and vacate the declaration of taking, should be declared null and void, and the district court instructed to enter an appropriate order granting possession of the property here involved to the United States.

Respectfully submitted,

RAMSEY CLARK,
Assistant Attorney General.

CECIL F. POOLE,
United States Attorney,
San Francisco, California, 94101.

J. HAROLD WEISE,
CHARLES R. RENDA,
Assistant United States Attorneys,
San Francisco, California, 94101.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys, Department of Justice,
Washington, D. C., 20530.

DECEMBER 1963

APPENDIX

(Suchy Report of January 23, 1961)

Plaintiff's Exhibit #3
(Identified and introduced at R. 104)

Rights-of-Way Acquired 5460
Elliott Creek Road No. 193
Eldred Cobb, et al.

Comments on the Proposed Interruptible Easement for the Elliott Creek Road Within the Boundaries of the W. L. Cobb, et al., Placer Claims

Reference is made to the maps included in the proposed condemnation case.

The road as shown on the map follows along the north slope of the Elliott Creek drainage. This slope has a thick talus cover for most of the distance within the boundaries of the claims. The road, as it is built today, required very little rock work, except near the west end of the group and at a few places where ridges interrupted the talus slopes. The Elliott Creek drainage, within the boundaries of the claims, is a steep-walled canyon with a fairly wide stream channel in the bottom. There are a few short distances within the claims where the canyon walls become almost vertical, and the channel becomes very narrow. These box-like canyons occur within the Daffodil No. 10 placer claim, Hazel placer claim, and along a distance of some 1,500 feet starting at the east end of the Pumpkin Seed No. 2 and continuing into the eastern portion of the Pumpkin Seed No. 1. The portion of the road through the box canyon areas was, for the most part, blasted out of the solid rock canyon walls, resulting in a road bed lying mostly on solid rock. The box canyon, being narrow, contains a very limited yardage of gravel;

however, some placering may be done by hand methods or with small power equipment that could cause the steep rock slopes of the road to slide away from the road bench. Mining in the narrow channels within the box canyon is rather improbable, and it is doubtful if an economic operation can be established.

The sampling results of various engineers, including Forest Service engineers that examined the property, indicate the auriferous gravels will have a value of somewhere between 30¢ to 75¢ per cubic yard. Estimates of the recoverable gravel present in the stream channel vary from 1½ million cubic yards to 5 million cubic yards. It is believed the recoverable gravel will run somewhere between 1½ million and 2½ million cubic yards. Test work done by the mining claimant shows that large boulders can be expected along the bedrock. Considering the previously-mentioned conditions, it is believed that the most practical and probably the only economic method for placering the Elliott Creek channel is by the use of either a floating washing plant or a dry-land washing plant which is fed by a dragline.

Mining operations with this kind of equipment would begin at the farthest point downstream where a continuous run of gravel occurs. This would probably mean that the bar beginning at the side line of the Hazel and Alta claims would be the site of the beginning of the operation. Since it is expensive to tear down and reassemble the washing plant, it is quite probable that the small bar below this point within the boundaries of the Pumpkin Seed No. 1 and Hazel claims would be worked by the use of portable sluice boxes rather than by the washing plant. The washing plant would be either a dry-land type on caterpillar tracks or a floating type on a boat hull. A dragline would then be set upstream of the wash-

ing plant, digging the gravel and swinging it into a hopper feeding either type of plant. This method of placer mining requires that the full width of the mineable channel is taken for economic reasons. Portions of the Elliott Creek Road would be breached as a result of this mining operation. This would occur only where gravel extended under the present road alignment, or where the side slopes would slough in to the excavation near the road. The portions of the road that might possibly be breached by the washing plant-dragline combination are as follows:

> Around 2,000 feet long along the road extending from about the middle of the Hazel claim to and including the Alta and Bright Gold claims.
>
> Beginning on the Daffodil No. 5 claim and extending upstream or to the east some 2,500 feet to about the center of the Daffodil No. 3 claim.

In addition, it is probable that three additional portions of the road may be breached as a result of placering narrow or isolated gravel bars by smaller equipment. These are: A distance of about 1,000 feet within the Pumpkin Seed No. 2, about 300 feet within the Pumpkin Seed No. 1, and about 1,200 feet within the Daffodil No. 10 and No. 9 claims. The damage that may be done to the road by the placering operation on the Pumpkin Seed No. 2 may be quite limited since most of this stretch of road has been blasted out of the steep side walls of the canyon. In regard to the other breaches, both by the washing plant and by a smaller scale placering operation, these will all fall within areas where the road has been built into the talus slopes of the drainage. The reconstruction of these portions should be relatively inexpensive and shoo-flies might be installed during mining operations that would permit hauling and access to continue without damage to either interest.

The possible breaching of some 7,000 feet of the road is, of course, conjectural. It is quite probable that there will be areas along the Elliott Creek channel that will not carry sufficient values to warrant placering and will be bypassed; also, as indicated by one of the claimants' tests, the edge of the channel may be too shallow and not carry sufficient values to warrant placering. Consequently, there may be much less encroachment upon the road alignment than is indicated. It is also possible that as placer mining progresses it will be found that it will be impossible to work the edges of the placer deposits where side cast material from the road slopes has diluted the auriferous gravels.

Another important factor to consider is the time element. A washing plant of the kind described, which is fed by a dragline, ordinarily could handle a half-million or more yards per year. Consequently, assuming 1½ million to 2½ million yards of available gravel, it is apparent that the mining operation, if pursued continually, could mine the entire gravel deposit in approximately three years. Considering the gravel may run between 30¢ and 75¢ per cubic yard and estimating that the placering method used will cost something like 35¢ per cubic yard, it is apparent that the profit margin does not allow for inefficient mining procedures. Consequently, the most economical operation would be continous whereby the equipment would be worked the maximum time avoiding costly shut-downs and waiting periods. Considering the present day costs of machinery and the resultant high amortization rate, together with the high wages for trained and common laborers, it is doubtful if the claimant can afford to expend his efforts in anything but the most efficient process of mining. It is always possible that the presence of shallow ground

and a large number of bedrock boulders together with possibly lower gold values than anticipated may result in a condition that will make mining the deposit at a profit impossible, and thus preclude any damage to the road whatsoever.

The claimants, E. T. Cobb, et al., have stated that they intend to apply for patent to the entire group of placer claims. At the present time a patent application is pending before the Sacramento Land Office for three claims; the Alta, Bright Gold, and Old Gold claims. The claimants have done most of their testing within the boundaries of these three claims and it is possible that one or all three of these may go to patent. In regard to the balance of the claims in the group, their chances of being patented are much less, and it is doubtful that many of these remaining will be patented.

It follows from the comments above that the interruptible type of easement would provide a reasonably continuous access across the Elliott Group of placer claims. There is a possibility that as much as 7,000 feet of road may be breached by mining operations; however, there is also reason to believe that mining operations may not cause near that amount of damage and maybe none at all. The cost of repairing breaches in the road alignment should be nominal as these probably would occur where the talus cover is quite deep, allowing the building of another road by side casting material.

The claimants are unrestricted in their mining of the Elliott Creek channel where there is no interference with the road alignment. The claimant must, according to the proposed interruptible easement, give the Government 60 days notice before they may conduct mining operations that will breach the road. This

is based on the results of a lawsuit by the claimants whereby they were compensated for the loss of the auriferous gravels that are not workable because of the road. Yet, under the provisions of the easement, the claimants may mine within the road alignment by merely giving 60 days notice. The writer believes that the mining claimants' rights under the general mining law are unaffected by the provisions in the proposed interruptible easement.

Date: 1-23-61

/s/ Milvoy M. Suchy
MILVOY M. SUCHY, Mining Engineer

APPROVED:

/s/ W. E. Bates
Acting Assistant Regional Forester

Date: 1-23-61

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